In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 349

FLOYD L. HOFFMAN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was brought by petitioner in the Court of Claims to review a determination by the Air Force Board for Correction of Military Records that petitioner was not physically disabled from discharging full military duties upon his separation from active service in 1952, and was therefore not entitled to disability retirement benefits under Section 402(a) of the Career Compensation Act of 1949, 63 Stat. 802, 816-817, as amended, 37 U.S.C. 272(a) (1952), as amended, 10 U.S.C. 1201 *et seq.* (1958).

1. Petitioner served on active duty as a commissioned officer in the United States Air Force from 1948 until April 29, 1952, when, by his own choice, petitioner was separated from active service (Pet. App. 34, 41). In connection with petitioner's request for release from active duty, he was given a physical examination on April 21, 1952 (Pet. App. 41). The history portion of the medical report of that examination noted an "[e]pisode of asthmatic bronchitis in Tokyo 1950-51 with penicillin therapy April 1951, with severe penicillin sensitivity reaction following," but stated that petitioner "[d]enies all other serious illnesses, injuries or operations" (*ibid.*). The medical officer who examined petitioner found him qualified for separation, and, on April 29, 1952, petitioner was separated from the active service by reason of "convenience" of the government (Pet. App. 41-42). Petitioner did not request a physical evaluation, disability, or any other kind of medical board for the purpose of determining whether he was fit to perform his military duties (Pet. App. 42).

Petitioner was employed in various accounting positions by the United States Government from July 1952 until December 1958, when petitioner's asthma condition, which began in 1951 and grew progressively worse over the years, caused his retirement, at age 55 (Pet. App. 34-41, 43-49). Subsequent to his retirement from federal civilian employment, petitioner engaged in the practice of accountancy, and, in March 1963, was employed as an accountant by the State of California (Pet. App. 43). Petitioner, who certified that he was physically fit to perform full

military duties in 1953, 1955 and 1956, retired from the Air Force Reserve on June 30, 1963 (Pet. App. 43-45).

2. On December 12, 1958, petitioner submitted an application to the Air Force Board for Correction of Military Records, requesting that his military records be changed to show retirement from the Air Force by reason of physical disability as of April 29, 1952 (Pet. App. 54).[1] Petitioner submitted considerable documentary evidence in support of his application, but indicated that he did not desire to make a personal appearance before the Board (Pet. App. 54-60). The Correction Board referred petitioner's application to the Office of the Surgeon General for review (Pet. App. 60). In a memorandum dated July 15, 1959, the Surgeon General rendered an opinion that "the conditions which existed at the time of separation were not of sufficient severity to warrant a finding of permanent incapacity and disability retirement" (Pet. App. 60-61). The Surgeon General concluded that "[n]o change in the record is believed indicated and none is recommended" (*ibid.*). By memorandum dated September 24, 1959, and letter to petitioner dated October 2, 1959, the Correction Board, acting upon the advice of the Surgeon General, determined that no corrective action was indicated in petitioner's case (Pet. App. 30, 61). Peti-

[1] Congress established correction boards for the several military departments for the purpose of determining whether to change military records "to correct an error or remove an injustice." 10 U.S.C. 1552 (1958).

tioner was not given a formal hearing before the Board on the ground that he had failed to submit sufficient evidence to establish a showing of "probable error or injustice" (Pet. App. 61).[2]

3. On April 13, 1962, petitioner filed a petition in the United States Court of Claims, alleging that the Correction Board had acted arbitrarily in denying his application. After the government answered, the case was referred to and heard before a trial commissioner. After hearing the medical testimony adduced by petitioner and receiving briefs and proposed findings from both parties, the trial commissioner, on May 7, 1965, filed a report containing extensive findings of fact (Report, pp. 1-26) and his conclusion that the Correction Board's findings were supported by substantial evidence and that the Board had not abused its discretion in refusing to change petitioner's military records and in failing to hold a formal hearing (Report, pp. 26-30).

The Court of Claims, by opinion dated May 13, 1966, adopted the trial commissioner's findings and dismissed the petition (Pet. App. 26-71). The court accepted petitioner's contention that he is presently physically disabled from discharging full military duty, and that his disability is service-connected (Pet. App. 32-33). The court below stated, however, that "the controlling question" is whether petitioner's physical condition "was such at the time he was

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[2] The applicable Air Force regulations provided for a hearing only if evidence is presented indicating "probable error or injustice." 32 C.F.R. 881.4(a) (1954).

separated from the Air Force that he was then unfit to perform the duties of his grade or rank because of a service-connected disability" (Pet. App. 33). "On the basis of the entire record," the court concluded, that question "must be answered in the negative" (*ibid.*).

The Court of Claims noted that the evidence submitted to the Correction Board was sufficient that the Board "might well have held a formal hearing," but stated that "the question of holding a hearing was a matter properly within the discretionary judgment of the Board upon which reasonable minds might differ; and the record in this case will not support a finding that the Board's administrative decision not to hold a hearing clearly constituted an abuse of discretion" (Pet. App. 33). The court concluded (Pet. App. 33-34):

> On the basis of the evidence submitted to the Secretary of the Air Force at the time of plaintiff's [petitioner's] release from active duty on April 29, 1952, the evidence submitted to the Air Force Board for Correction of Military Records, and the evidence of record as a whole, it cannot be found that either the action of the Secretary of the Air Force in releasing plaintiff from active duty "not by reason of physical disability," or the decision of the Correction Board not to hold a formal hearing for the purpose of giving plaintiff an opportunity to try to establish his disability, or the action of the Board in refusing to change plaintiff's military records to reflect that he was retired because of a service-connected disability, was arbitrary, capricious or not supported by substantial evidence.

On September 15, 1966, petitioner moved in the Court of Claims for rehearing, contending, *inter alia*, that in determining petitioner's condition as of April 29, 1952, the date of his separation, the court had erroneously excluded from its consideration petitioner's subsequent medical history. In its order dated October 28, 1966, the Court of Claims stated that, when it rendered its decision on May 13, 1966, it understood that the trial commissioner, whose findings it adopted, "had considered post-separation evidence in finding plaintiff [petitioner] fit upon separation to perform his duties." However, because "[t]he motion for rehearing raises a substantial question as to the correctness of this assumption," the court below granted petitioner's motion "to the extent that the case is remanded to the trial commissioner for the submission of a memorandum to the court as to whether and, if so, to what extent the commissioner considered plaintiff's post-discharge or post-separation medical history in finding plaintiff fit to perform the duties of his grade or rank at the time of separation."

On November 7, 1966, the trial commissioner filed a memorandum in which he stated that his previous report, filed May 7, 1965, was based upon "consideration of the whole record," including "all documentary material received in evidence in this proceeding and the testimony presented during the trial concerning plaintiff's post-separation medical history" (Memorandum, p. 2). The trial commissioner explained that, instead of supporting petitioner's position, the "post-separation medical history and evi-

dence shows that his condition did not progress to the point that it was so severe as to be incapacitating until long after he was discharged" (Memorandum, p. 6). The trial commissioner specifically noted that he had rejected the opinion of petitioner's private physician, Dr. Nesbitt, who began treating petitioner in March 1957, not because it was "based on a retrospective diagnosis," but because it was not supportable "in light of all of the testimony and other evidence in the entire record" (Memorandum, pp. 11-12).

On February 10, 1967, after considering further briefs filed by the parties, the Court of Claims denied petitioner's motion for rehearing.

4. Petitioner's contention (Pet. 6-13) that the Court of Claims failed to consider post-separation medical evidence is thus amply refuted by the record.[3] Petitioner's additional contention (Pet. 13-15), that the record establishes that he was disabled from discharging his military duties upon his separation from active service in 1952, was fully considered by (1) the Air Force Board for Correction of Military Records, which received extensive documentary evidence; (2) the trial commissioner, who heard the testimony of petitioner and his medical witnesses; and (3) the Court of Claims, which received extensive briefs filed by petitioner. The Correction Board concluded that petitioner had not established that his

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[3] Petitioner's contention (Pet. 16-17) that the Correction Board "made no findings of fact" also lacks substance (see *supra*, p. 3).

condition upon separation was sufficiently severe to warrant a finding of disability retirement and that a formal hearing was not warranted. Both the trial commissioner and the Court of Claims concluded that the Correction Board's findings were supported by substantial evidence on the record as a whole and that the Board had not acted arbitrarily. There is plainly no occasion for further review of these factual determinations.[4]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

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[4] As petitioner notes (Pet. 14-15), Air Force regulations provide that, while a history of asthma of any degree is a cause for rejection of an initial application or commission, an asthma condition is a basis for separation only if the condition is so severe that it prevents proper performance of military duties. Here the record shows that full consideration was given to petitioner's asthma condition in the light of its severity and its effect on petitioner's performance of his military duties.

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